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QUESTION PRESENTED

Whether non-professional employees of a consultant engineering firm, engaged in preparation of plans, specifications, drawings and designs for use in the repair, improvement and extension of existing instrumentalities of interstate commerce or of existing facilities devoted to the production of goods for commerce, are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.[1]

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 63 Stat. 910, 29 U. S. C. 201, *et seq.*, the pertinent provisions of which are set forth in Appendix A to the petition, p. 11.

STATEMENT

The Secretary of Labor brought this action to restrain petitioner from violating Section 15 (a) (1) of the Fair Labor Standards Act pro-

[1] This action is not concerned with "professional" employees who may meet the requirements for exemption under Section 13(a)(1) of the Act, which provides:

"(a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesmen (as such terms are defined and delimited by regulations of the Administrator); * * *."

The exemption issue was not raised by petitioner in the courts below and is not presented here, the only real issue being whether employees engaged in clerical, office and other non-professional work are within the general coverage of the Act.

hibiting shipment, delivery or sale of goods produced in violation of the Act, and Section 15 (a) (2) prohibiting violation of the overtime provisions (R. 1).[2] It is stipulated that if the Act covers petitioner's employees, overtime violations exist (R. 23–24). The only evidence in the case is a stipulation and a supplemental stipulation (R. 6–25).

Petitioner is a consultant engineering firm which prepares plans, specifications, estimates, and surveys for the reconstruction, remodeling, extension, improvement and enlargement of buildings, electric transmission lines and power stations, highways and other instrumentalities of commerce (R. 1, 4, 11–14, 17–18, 19–20). To perform this work petitioner employs some 43 employees (R. 4).

For convenience, the activities of petitioner's employees, during representative periods in the years 1950–1953, may be divided into two categories:

First, preparation of plans, specifications, estimates and surveys for improving and extending existing instrumentalities of commerce, including: (1) numerous existing streets used in interstate commerce before and after the improvement (R. 13–20); (2) an interurban railroad's electric power plant which furnished energy to operate its railway on which freight was hauled in interstate commerce before and after the improve-

[2] Record references are to the record as printed for the use of the Court of Appeals, nine copies of which have been filed with the Court.

ments of the plant (R. 11–12); and (3) a new electrical transmission line for an existing power system furnishing electric energy for interstate radio broadcasts and for controlling interstate plane traffic at an airport (R. 21, 23).

Second, preparation of plans, specifications, surveys and estimates for the reconstruction and enlargement of a municipal power plant and for construction of additional buildings for existing electrical transmission and distribution systems, supplying customers who produce goods for commerce, including (1) the municipal power plant of the City of Pella, Iowa, which furnishes electrical energy to persons who use it for lighting and power in processing and manufacturing a large variety of goods shipped outside the State (R. 12–13); and (2) new headquarters buildings for three rural electrification cooperatives which were engaged at the time in transmitting and distributing electric energy to railroads for operation of trains hauling interstate freight and passengers, to factories producing goods for interstate commerce, to telephone networks and radio stations for interstate messages and programs, and to a State highway patrol for communications controlling interstate traffic (R. 20–23).

On all of the foregoing projects, petitioners furnished a "resident engineer," to inspect the materials and the work either constantly or periodically to determine whether the materials met the specifications and whether the work was being

performed in accordance with the plans and specifications. In addition, the "resident engineer" makes periodic estimates of the progress of completion of the work, reports this to the owner, and recommends payment if the work has met the plans and specifications. The "resident engineer" does not perform or supervise or direct performance of the fabrication or erection work at the construction site, except to determine whether the plans and specifications have been met and report accordingly to the owner (R. 8–10, 23). The contracts for the alteration and improvement of the Pella municipal power plant, and for the pavement of all the roads and streets described above, contained a provision that the decision of the engineer as to the meaning of the plans and specifications, and whether they had been met, was final (R. 24–25).

The trial court dismissed the complaint on the ground the activities of the petitioner's employees were "too far removed" from commerce or the production of goods for commerce to be within the scope of the Act (R. 33, 34; Pet. 12–21). The Court of Appeals reversed, holding the employees' activities in connection with the repair and improvement of existing instrumentalities of commerce were sufficient to bring them within the "in commerce" phase of the Act's coverage, and concluded that no decision was necessary as to whether the employees were also

engaged in "production of goods for commerce" (Pet. 22–34).

ARGUMENT

The decision below is a correct application of principles well settled by the decisions of this Court construing the coverage of the Fair Labor Standards Act, and does not conflict with decisions of any other Court of Appeals. No novel problem is presented.

1. The ruling below, in reasoning and in result, accords with this Court's decisions in *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Pedersen* v. *Fitzgerald Co.*, 324 U. S. 720; *Alstate Const. Co.* v. *Durkin*, 345 U. S. 13; *Thomas* v. *Hempt Bros.*, 345 U. S. 19; *Mitchell* v. *C. W. Vollmer & Co.*, 349 U. S. 427. See also *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. 2d 334, certiorari denied, 345 U. S. 915. Under these decisions it is now established that employees engaged in the repair or improvement of roads, railroads and other facilities used as instrumentalities of interstate commerce are engaged "in commerce" within the coverage of the Act, and that "[b]y the same token he who produces goods for these indispensable and inseparable parts of commerce produces goods for commerce" (see *Alstate*, 345 U. S. at 16). These holdings also establish that the test for determining the coverage of this Act is "by practical considerations, not by technical conceptions" (*Vollmer*, 349 U. S. at 429).

The work of preparing surveys, plans, specifications, and designs for use in the repair or improvement of existing interstate instrumentalities and facilities is as much a part of "the work of improving existing facilities of interstate commerce" and "of the redesigning of an existing facility of interstate commerce" (see 349 U. S. at 430), as was the "building of guide levees"—an initial step in the construction of the lock and canal improvement to an existing interstate waterway—held covered in *Vollmer*. These necessary preliminary tasks are nonetheless "essentially a part of the larger one" of accomplishing the repair or improvement of the interstate facility. See *Pedersen* v. *Delaware, L. & W. R. R. Co.*, 229 U. S. 146, 152. The surveys and specifications are indeed the immediate foundation upon which all of the succeeding admittedly covered construction work depends. It is clearly not "isolated, local activity" but is rather "in practical effect, a part of" the improvement of the interstate facility (*Vollmer*, 349 U. S. at 429). Plainly, too, the preparation of plans and designs for use in the repair and improvement of interstate facilities is as much production of goods for such commerce as is the mixing of road materials for the same purpose. See the *Alstate* and *Hempt Bros.* decisions, *supra*.

Petitioner's suggestion that the work of his employees is not covered because petitioner per-

forms professional and consultative services and does not engage in the physical construction work (Pet. 8) is without merit. As this Court has explicitly recognized with respect to the coverage of this Act, the modern industrial pattern does not consist simply of "manual, physical labor." *Borden Co.* v. *Borella,* 325 U. S. 679, 683. "Equally a part of that pattern are the administration, management and control of the various physical processes together with the accompanying accounting and clerical activities. * * * He who conceives or directs a productive activity is as essential to that activity as the one who physically performs it" (*ibid.*).[3]

[3] Petitioner's reliance on the statement of the House Conferees (Pet. 9), that "employees of a local architectural firm" would not be covered under the 1949 amendments, is equally mistaken. The activities of the employees here in question are neither "local" nor "architectural." It is engineering rather than architectural, dealing with types of equipment and installation of machinery for electrical power plants, transmission lines, roads and streets—all quite different from the alteration of an ordinary building in which manufacturing or similar work is carried on, which the above statement specified as illustrative of "architectural" work. Indeed, even if work of this sort were properly characterized as "architectural", the Conferees' statement concerning "local architectural" services would not be applicable to such work when performed specifically for and in connection with the improvement of interstate instrumentalities and facilities. For such work is no less a part of, or no less closely related and directly essential to, the interstate commerce or interstate production of goods, merely because it is "architectural." The "local" activity contemplated by the Congressional statement is the planning of buildings or

2. Petitioner's objection to the decision below appears to rest almost entirely upon a confusion of the coverage provisions of this Act with the exemption provisions. But the fact that the employer may be "professional", and that some of his employees may qualify as "professional" within the meaning of a specific limited exemption, does not mean that the work is any the less a part of interstate commerce or that the non-professional employees participating in such interstate activity are not within the coverage of the Act. On the contrary, the clear implication of the limited exemption for an "employee employed in a bona fide * * * professional * * *

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structures of a character suitable for indiscriminate use, which only casually or sporadically might be an interstate use. This seems evident from the other examples cited—a "local exterminator," and a "local independent nursery" mowing lawns around a plant engaged in producing goods for commerce.

Quite plainly, petitioner's preparation of plans and specifications specifically for interstate facilities resembles much more the production of tools and dies specified as covered (95 Cong. Rec. 14929), rather than such incidental services as exterminating or mowing lawns around a plant. In fact, petitioner's preparation of plans and specifications bears precisely the same intimate relation to interstate commerce as maintenance of machinery and manufacturing of tools and dies to be used in production of goods for commerce, or the preparation of materials for use in road maintenance the Conferees' statement have no applicability whatsoever to *Durkin*, 345 U. S. 13). And, clearly, the examples given in the Conferee's statement have no applicability whatsoever to preparation of plans specifically for the improvement of interstate instrumentalities, such as are involved in the instant case.

and improvement (held covered in Alstate Const. Co. v.

capacity" (Section 13 (a) (1)) is that employees not qualifying as "professional" are within the scope of the Act, if the standards for coverage are otherwise met.* Whatever might be the professional status of petitioner himself, there is nothing in the record to indicate that the employees to whom this action relates performed professional work of any kind; no such issue was raised by the pleadings and no such contention was made below. See footnote 1, *supra*, p. 2. To adopt petitioner's apparent premise that all of his employees are outside the scope of the Act because petitioner (the employer) is engaged in a profession would be patently inconsistent with the repeated rulings of this Court that "the applicability of the Act is dependent on the character of the *employees'* work," not upon the nature of the employer's general business (emphasis added). *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 132; *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184–5; *McLeod* v. *Threlkeld*, 319 U. S. 491, 497.

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* As this Court explicitly stated in *Borden Co.* v. *Borella*, 325 U. S. 679, 684: "Indeed, the fact that § 13 (a) (1) specifically excludes * * * those employees employed in a bona fide executive, administrative or professional capacity is clearly consistent with the conclusion that these activities are included within" the coverage of the Act, and "that full effect should be given that fact unless otherwise provided".

3. The decision below also clearly accords, rather than conflicts, with rulings of other Courts of Appeals. Petitioner does not explain how or in what respect a conflict arises between this decision and the two appellate court decisions on which he relies. One of these, *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C. A. 2), held, like the court below, that employees engaged in preparing plans for extending runways, reconstructing the control tower and adding to hangars at an airfield—work indistinguishable from that of petitioner's employees—were "engaged in commerce." The other, *Kelly* v. *Ford, Bacon & Davis*, 162 F. 2d 555 (C. A. 3), has no relevance to petitioner's situation; for the construction there (as the court below pointed out, Pet. 30, see 162 F. 2d at 556, 557) did not relate to "the repair, alteration and improvement of existing instrumentalities of interstate commerce," nor to improvement of any existing facilities, but, "unlike the present" case, related to an entirely "new factory." The other Courts of Appeals which have ruled on this general question are in accord with the decision below. *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334 (C. A. 10), certiorari denied, 345 U. S. 915; *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, 337 (C. A. 9); *Tobin* v. *Ramey*, 205 F. 2d 606 (C. A. 5), rehearing denied, 206 F. 2d 505, certiorari denied, *sub nom. Hughes Construction Co.* v. *Secretary of*

Labor, 346 U. S. 925; *Bennett* v. *Loftis Co.*, 167 F. 2d 286, 287 (C. A. 4).

The only other case relied on by petitioner is a district court decision in *McComb* v. *Turpin*, 81 F. Supp. 86 (D. Md.). But the court's detailed analysis of the stipulated facts in that case suffices to distinguish it from the instant case. The court emphasized that "the stipulation of facts furnishes only meager information as to the building or construction work. Many of the projects so listed obviously had no relation whatever to interstate commerce or the production of goods for commerce * * *" (81 F. Supp. at 91).[5] While the court noted that some of the projects listed in the stipulated facts "apparently comprehend projects or other construction work on State highways, or paving and mechanical utilities for a municipal airport," it pointed out that "There is, however, no particular or detailed information furnished as to the precise nature and character of such construction work, or to what extent it may be necessary for interstate commerce. Nor does the stipulation afford information as to what proportion of the projects on which the defendants have recently been or are now engaged, relate either directly or indirectly to interstate commerce or the production of goods for commerce" (*ibid.*).

[5] These deficiencies in the record were among the primary reasons for the Government's decision not to appeal the *Turpin* case.

It is evident that the court assumed that "Mostly their [defendants'] services relate to the original construction of buildings rather than to additions or alterations" (*id.* at 88) and that little if any of the work related to improvement of existing interstate instrumentalities and facilities. Thus, it specifically stated that the question before it "is narrowed to whether the preparation of plans and specifications for an original building, or additions or alterations therein, which may be used for the production of goods for commerce, constitutes an activity by the employees in an occupation 'necessary' to the production of such goods" (*id.* at 92). The court repeatedly emphasized that it was "not contended by the plaintiff that the defendants' employees are engaged in interstate commerce" (*id.* at 90, 92, 94). Obviously, there was not the specific evidence, present in the instant case, of substantial work performed directly in connection with the improvement of interstate instrumentalities and facilities.

To the extent that the *Turpin* decision implied that there would be no coverage even if it were assumed that the work related to improvement of interstate facilities, the decision is not only inconsistent with the appellate court decisions cited in the text, *supra,* pp. 10–11, but rests upon reasoning inconsistent with the subsequent decisions of this Court in the *Vollmer, Alstate* and *Hempt* cases discussed *supra,* p. 6.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

HARRY M. LEET,
Attorney,
United States Department of Labor.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 350

KENNETH R. BROWN, Doing Business as BROWN ENGINEERING COMPANY, *Petitioner,*

v.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF ON BEHALF OF NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AS AMICUS CURIAE

MILTON I. BALDINGER
700 Wyatt Building
Washington 5, D. C.
Attorney for Amicus Curiae

Of Counsel:
MILTON F. LUNCH

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

Consent to the filing of a brief *amicus curiae* has been given to the National Society of Professional Engineers (hereinafter referred to as "NSPE") by the Solicitor General and counsel for petitioner. NSPE

is a non-profit membership corporation made up of over 31,000 individual professional engineer members, all of whom are registered under state laws which regulate and restrict the offering to the public of professional engineering services to those who have demonstrated their competence to the state licensing board. Such laws exist in all states, as well as Alaska, Hawaii, Puerto Rico and the District of Columbia. In addition, the NSPE membership includes over 3,500 Engineer-in-Training members, who occupy a pre-professional status pending the acquisition of the practical experience required under the state registration laws.

Based on statistics of the National Council of State Boards of Engineering Examiners, as of June 30, 1954, there were approximately 190,000 professional engineers who are entitled under the state registration laws to engage in consulting engineering practice. It is estimated that the compilation of June 30, 1955, will disclose at least 200,000 professional engineers in this category. Analyses by NSPE of the occupational status of its members indicates that of the estimated 200,000 registered professional engineers, approximately 22,000 professional engineers are in private consulting practice. They and their staffs of employees have a direct and immediate interest in the outcome of this litigation.

THE PROFESSION'S INTEREST IN THE LITIGATION

The primary interest of the *amicus curiae* in this litigation lies in the belief that the practice of professional engineering is not business or commerce under the Fair Labor Standards Act. The offer and performance of a professional service is not the ordinary

business and commercial operations Congress intended to bring under regulation through the Fair Labor Standards Act, as amended.

The issue here, in essence, is whether primarily intellectual, non-standardized and unique services, requiring advanced knowledge and training in a professional field, shall be held in the same classification as normal business and commercial operations. In this sense, the issue is as ancient as the sixteenth century. W. Somerset Maugham relates in his essay, "El Greco":

> "When the authorities taxed him upon the profits of his work at Illescas he [El Greco] fought them and got judgment in his favour. So far as I can understand the argument his contention was that what he sold was not canvas and paint, but the art with which he had arranged the paint, and this was not dutiable."

So here, the *amicus curiae* contends that the consulting professional engineer is selling not the paper upon which his plans appear, but his specialized knowledge and skill based on professional training and related exclusively to the peculiar problems and needs of the client according to the circumstances.

The Congress has repeatedly recognized that persons in professional classifications stand in a different light than others subject to the particular statute in point. The Labor Management Relations Act, 1947, as amended, for example, makes special provision for separate representation or decertification elections restricted to professional employees, as defined in such Act. The definition in Section 101(12) indicates the Congressional recognition of the unique nature of professional activities:

"The term 'professional employee' means—

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

"(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a) and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

The Fair Labor Standards Act, as amended, provides that the minimum wage and overtime pay provisions shall not be applicable ". . . with respect to (1) any employee employed in a bona fide . . . professional . . . capacity . . . (as such terms are defined and delimited by regulations of the Administrator . . ."

In an entirely different context, Congress recognized the unique nature of professional services in the Army Organization Act of 1950 by providing in Section 306 (f):

"Under regulations prescribed by the Secretary of the Army, officers of the Army assigned to

technical, scientific, or other professional duties shall possess qualifications suitable for the performance of those duties; and, when the duties involve the performance of professional work, the same as or similar to that usually performed in civil life by members of a learned profession, such as engineering, law, medicine, or theology, they shall, unless the exigencies of the situation prevent, possess, by education, training, or experience, qualifications equal or similar to those usually required of members of that profession."

These examples are intended to convey only the general sense of Congress in recognizing that professional activities stand in a different position and require administrative treatment distinguished from that accorded business or commercial pursuits.

Consulting engineers are deeply concerned with the onslaught made by the United States Court of Appeals for the Eighth Circuit on professional engineers who practice locally in a state in sweeping them into "interstate commerce" as covered in the Fair Labor Standards Act, as amended. It is their view that such is contrary to the clear expression of Congress as to the intent of the legislation. Further, the decision of the Eighth Circuit, if left undisturbed, will swallow the local activities of other professions just as it has improperly forced the consulting engineers engaged in local activities in the Eighth Circuit to come within the coverage of the Fair Labor Standards Act, as amended. The attendant costly record keeping and the additional unnecessary inroads into purely local activities under the guise of the "interstate commerce" label must be halted, especially where the Congressional intent to the contrary is clear in the matter.

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit's decision runs head-on into *McComb* v. *Turpin*, 81 F. Supp. 86 (D.C. Md. 1948). The decision is contrary to Congressional intent as expressed by the House Conferees, Report No. 1453, 81st Congress, pp. 14-15 on The Fair Labor Standards Amendments of 1949.

Although the direct conflict of decisions between the Eighth Circuit in the instant case and the District Court in Maryland in the *Turpin* case is not sufficient reason by itself to warrant certiorari, yet it brings into bold relief our contention that the issue is important and deserves to be answered by the Supreme Court in light of what transpired after the *Turpin* case was decided.

(a) Professional engineers practicing in Maryland consider themselves free from the provisions of the Fair Labor Standards Act under the decision of *McComb* v. *Turpin*. Since the decision was not appealed by the Administrator of the Wage and Hour Division of the United States Department of Labor to the Fourth Circuit Court of Appeals, professional engineers in West Virginia, Virginia, North Carolina and South Carolina deem themselves likewise protected.

On the other hand, since the *Brown* decision in the Eighth Circuit, the professional engineer in Iowa, Missouri, Minnesota, Arkansas, Nebraska, North Dakota, and South Dakota must operate differently.

This situation requires correction. It is important that professional engineers throughout the country operate uniformly in this matter.

(b) Congress was aware of the decision of Judge Chesnut in *McComb* v. *Turpin*, when the Fair Labor

Standards Amendments of 1949 were enacted. The House Conferees, Report No. 1453, 81st Congress, pp. 14-15, cited some examples of cases where the Act clearly would not be applicable. Example 5 reads:

> "The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production: * * *
>
> "5. Employees of a local architectural firm whose activities include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce (1944-45 W. H. Man., p. 125)."

If we were to substitute the word "engineering" for "architectural" in the example, we would fit the intent of Congress. The substitution is a fair one to make.

Dean Nathan W. Dougherty, School of Engineering, University of Tennessee, in his book "Engineering Registration" (University of Tennessee Press, 1951) states at page 63, *et seq.*

> "* * * Architects want to build bridges, engineers want to build buildings; each thinks his group should have a monopoly on certain kinds of work. Then the fireworks begin.
>
> "From the legal definitions of the two professions it is easily seen why there should be conflict. Both are claiming proficiency in the same area, and in lean years there will not be enough work to go around; besides each profession is apt to be jealous of any apparent inroads into its prerogatives. * * *

"There are certainly some areas where a practitioner in either field may perform with requisite skill, while there are other areas of practice, not common to the two professions, where an architect or engineer should do the work. Fortunately, an intelligent practitioner in either field can soon become sufficiently familiar with the adjacent areas of practice to form critical judgments of the other's work as the two professions collaborate on joint activities. * * *"

Provisions relating to overlapping practice are contained in 32 state engineering registration laws. In fact, many members of NSPE are in firms whose partners include architects. Additionally, a number of engineering schools give courses in Architectural Engineering by name.

2. The Eighth Circuit's decision attempts to stretch *Mitchell* v. *Vollmer,* No. 387, October Term, 1954, 23 Law Week 4292, beyond anything contemplated by the Supreme Court. The Eighth Circuit confuses the difference between one who works for a contractor or builder and one who works for a professional planner, designer, consultant, by considering such difference "of minor significance."

In *Mitchell* v. *Vollmer,* the employees performed work in the construction of an earthwork embankment and concrete platform for the Algiers Lock. The majority of Your Honorable Court concluded that those working on the Algiers Lock were "engaged in commerce" within the meaning of Section 7 of the Fair Labor Standards Act.

In the case at bar, the Eighth Circuit relies heavily on *Mitchell* v. *Vollmer's* teachings. However, may we

via "poetic license" dramatically point up the error of the Eighth Circuit in even considering the *Vollmer* case applicable. Let us assume the following.

A consulting engineer prepared the plans and specifications for the "Algiers Lock." He was under pressure to get the work out and had his staff, including stenographers, work overtime. They all realize that flexibility of time is necessary in any professional service office according to the urgency of the client's purposes. They also realize that in employment of that nature there will be "peak" periods and "slack" periods. When the work load falls, the staff compensates for the "overtime" by attending to purely personal matters or by later arrivals or earlier departures. Does *Mitchell* v. *Vollmer* consider such flexible operation a violation of Section 7 of the Fair Labor Standards Act, as amended?

Nextly, a firm of lawyers prepared the contracts and other legal papers appertaining to "Algiers Lock." Their stenographers and staff were treated just like that of the consulting engineers. These rendered their services prior in time to the "work performed in the construction" of the embankment.

To Mr. Justice Douglas, speaking for the majority, the test "is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of intertsate commerce as to be, in practical effect, a part of it, rather than isolated, local activity."

Does *Vollmer* consider such conduct, of the consulting engineer or lawyer within the Act? It appears that the Eighth Circuit would answer in the affirmative. Congressional intent does not point to such broad sweep of the Act. The Supreme Court should speak on the point.

3. The Eighth Circuit's decision challenges the principles and tests utilized by the Third Circuit in *Kelly* v. *Ford, Bacon and Davis, Inc.* 162, F. 2d 555 (1947). It also side swipes one of the basics set forth by the Second Circuit in *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (1947).

CONCLUSION

The *Brown* case raises an important issue and the record is not cloudy. There is no need to have different aspects of the issue further illumined by the lower courts. Additional expensive litigation is not necessary and should be avoided for the benefit of the Government and the professional engineers. A final decision from the Supreme Court is needed to do so. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MILTON I. BALDINGER
Attorney for Amicus Curiae

Of Counsel:
MILTON F. LUNCH

Certificate

I, Milton I. Baldinger, attorney for the National Society of Professional Engineers, *amicus curiae,* and a member of the Bar of the Supreme Court of the United States, certify I mailed a copy of the foregoing Brief to the Offices of the Solicitor General and to counsel for petitioner on September 23, 1955, with postage prepaid.

MILTON I. BALDINGER

End